In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~[illegible]~~ 70-32

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA,
LOCAL UNION NO. 1,

Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 19875.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Decided and Filed June 10, 1970.

Before: WEICK, CELEBREZZE, and BROOKS, Circuit Judges.

CELEBREZZE, Circuit Judge. This cause is before the Court on the petition of the Pittsburgh Plate Glass Company, Chemical Division, [hereinafter "the Company"] to review, and upon the National Labor Relations Board's cross-application to enforce a Labor Board order[1] requiring the Company to cease and desist from refusing to bargain collectively with the Union about changing health insurance benefits for previously retired employees, who prior to their retirement, had been actively working for the

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[1] The Board's Decision and Order are reported at 177 NLRB No. 114 (1969).

Company in the collective bargaining unit represented by the Union, and who, upon their retirement, became covered by a Union-negotiated retirement benefit plan. The Board found that by proposing improvements in their retirement health plans to retirees individually, rather than bargaining such alterations collectively with the Union, the Company "unilaterally modified" the retirement benefits in violation of Section 8(a)(5) and (1) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. § 158(a)(5) & (1) (1964). Local Union No. 1, Allied Chemical and Alkali Workers of America ["the Union"], which filed the charges initiating these proceedings, has intervened herein, and several other interested parties have filed briefs *amici curiae*.[2] This Court has jurisdiction under Section 10(e) and (f) of the Act.

The facts, which are essentially undisputed, raise a question of first impression, so far as we are able to determine, before this or any other Court under the National Labor Relations Act, as amended.

I.

Since 1949, the Union has been the exclusive bargaining representative for Company employees in a unit composed of:

> "All employees of the Employer's plant and limestone mine at Barberton, Ohio working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors within the meaning of the Act."

[2] Briefs urging enforcement of the Board's order were filed by the American Federation of Labor and Congress of Industrial Organizations; the Amalgamated Transit Union, AFL-CIO; the International Union, UAW;. and the United Steelworkers of America, AFL-CIO. Briefs urging that the Board's order be set aside were filed by the Union Carbide Corporation, the National Association of Manufacturers of the United States of America; and the Chamber of Commerce of the United States of America.

In 1950, the Union and the Company negotiated provisions for an employee group health insurance plan. An oral agreement was made that retired employees could also participate in the plan by paying a stipulated premium, which would be deducted from their pension benefits. The Company made no contribution toward retired employees' health insurance premiums under this program. Except for an improvement unilaterally instituted by the Company in 1954, and another improvement negotiated in 1959, this program remained unchanged in all relevant respects until 1962.

In 1962, the parties entered into a memorandum agreement by which the Company agreed to contribute $2.00 per month toward the cost of the monthly premium for medical benefits, but only for persons who retired from the Company's employ after June 27, 1962. Persons already retired prior to that date received no such contribution. In these negotiations the parties also agreed to make age 65 the mandatory retirement age.

During negotiations for a new labor contract in 1964, the parties again bargained about insurance benefits for retired employees. The Company agreed to increase its contribution to medical benefits for persons retired after June 27, 1962 from $2.00 per month to $4.00 per month. However, anticipating the enactment of Medicare legislation, the agreement provided that if a government health program were enacted, the Company could reduce its contribution by the amount of the 1964 increase, *i.e.*, $2.00 per month.

On November 23, 1965, following the enactment of Medicare and during the term of their outstanding collective bargaining agreement, the Union asked the Company to engage in mid-term bargaining for the purpose of renegotiating insurance benefits for retired employees of a type not available under Medicare. The Company took the

Union's request under advisement and responded at a meeting held on March 21, 1966. First, the Company announced its intention to reclaim its contribution of the extra $2.00 per month beginning July 1, 1966, the effective date of Medicare. The Company's right to do this under the 1964 contract is not in dispute. Second, the Company said it intended to cancel the negotiated health insurance plan for retired employees because, in its opinion, the enactment of Medicare made this insurance useless, and to substitute therefor a $3.00 monthly contribution for supplemental Medicare benefits for each employee who retired after July 27, 1962. Third, the Company rejected the Union's request to bargain for a supplemental insurance plan, and challenged the Union's right to bargain for retired employees at all.

The Union conceded the Company's contract right to reduce its contribution, but challenged the Company's right to unilaterally substitute supplemental Medicare for the negotiated health program.

Two days later, on March 23, 1966, the Company told the Union that, having reconsidered its position, the Company would not unilaterally substitute Medicare for the negotiated health insurance. Instead, the Company said it intended to mail letters to retired employees announcing that they could choose to withdraw individually from the negotiated health insurance plan and, in lieu thereof, the Company would contribute $3.00 per month towards supplemental Medicare premiums.

The Union objected to this proposed action, asserting the right to bargain about any change in the contract affecting the health insurance plan. Nevertheless, the Company refused to bargain with the Union, and, on March 24, 1966, mailed the aforementioned letters to retired employees with the result that 15 out of 190 retirees elected the $3.00 contribution to Medicare instead

of the negotiated $2.00 contribution to the private health insurance program.[3] In response to the Company's action, the Union filed the instant charges.

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[3] That letter which forms the basis of this controversy, provided:

Dear Pensioner:

The matter of your Hospital-Medical Insurance is of the utmost importance to you; therefore, we recommend that you read this letter carefully.

The program of Hospital and Medical benefits under the Federal Social Security Act, known as Medicare will become effective on July 1, 1966. Any person who has attained age 65, whether they ever worked and were covered by Social Security or not will be eligible to receive benefits under this program.

Hospital Benefits under Medicare will be received automatically by any person 65 years of age or over; no enrollment or payment of premiums is required. However, *Medical Benefits* are voluntary and do require enrollment and the payment of a premium of $3.00 a month per person. Enrollment for Medical Benefits must be completed by March 31, 1966, otherwise, enrollment will be delayed to a future date and benefits will be lost.

You are urged to enroll for the Medical benefits available to you as soon as you become eligible since at present you are under 65 years of age. If you have any questions concerning the program, contact your nearest Social Security office when appropriate to do so.

As a pensioner who at present is under age 65, you have been enrolled in a program of Hospitalization-Medical Insurance, as furnished by the Equitable Life Assurance Society, your participation in this program of Insurance for either single coverage or for coverage for you and your spouse has been a voluntary election on your part, and enrollment has been conditioned on your timely payment of the full monthly premium for the type coverage you elected to carry.

It is necessary to inform you at this time, that in your case, the program of Insurance provides that the current Company monthly contribution of $4.00 will be reduced to a $2.00 monthly contribution when Social Security Hospital-Medical benefits program goes into effect in July 1966. This is in accordance with prior arrangements on this matter. However, this reduction will not take place until the month following the month in which you become age 65 or are eligible for Social Security Hospital-Medical benefits.

Should you elect to continue your present coverage *after you become age 65* and are eligible for the Social Security

(Continued on following page)

The Board's Trial Examiner conducted hearings into the complaint, found the foregoing to be the facts, and concluded that pensioners and retirees are not employees as defined by Section 2(3) of the Act, are not employees

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(*Continued from preceding page*)

Hospital-Medical Program, the same benefits as outlined in the Certificate of Insurance will continue. We must remind you, however, in considering continuance of your present program of Hospitalization and Medical Insurance that, with respect to this plan there will be no duplication of benefits that are also paid for under the Medicare program.

The Company would like also to inform you that upon your reaching age 65, should you elect to voluntarily discontinue your enrollment in the present Hospitalization Medical program of insurance then your monthly premiums would no longer be deducted from your pension check, and the full amount will be available to you following your withdrawal from the plan.

In the event you do elect to discontinue your present enrollment, after you reach age 65, the Company will then make a contribution of three dollars ($3.00) per month to you, which amount would cover the current individual cost to you for your Social Security enrollment.

If after you reach age 65 and elect to discontinue your present enrollment, but your spouse is under age 65, and not yet eligible for the Social Security Hospital-Medical program you may elect to continue her in the present program of Insurance as currently furnished by the Equitable Life Assurance Society, until she reaches age 65 or becomes eligible for the Social Security Hospital-Medical Program. In order to enroll her in this manner you must notify the Company and timely pay the full cost of the premium for single coverage for your spouse. The initial cost of this coverage will be $5.71 per month effective July 1, 1966.

If you have any questions concerning this matter, you may contact Mr. Frank Ruehling in the Insurance Department at the Barberton Plant.

Yours very truly,

W. R. Harris

W. R. Harris

The above-quoted letter was mailed to retirees under age 65 carrying insurance to which the Company made a contribution. Other letters, explaining retirees' rights under Medicare, the negotiated retirement health plans, and the proposed supplemental Medicare contributions, were mailed to: retirees having no insurance coverage; retirees carrying plans of insurance to which the Company made no contribution; retirees carrying insurance to which the Company contributed; and retirees under age 65 carrying insurance to which the Company made no contribution.

within the meaning of Section 8(a)(5), and are not within the bargaining unit; that a Company has no statutory duty to re-negotiate benefits for previously retired employees; that the letter from the Company to the retirees did not constitute a "unilateral change" of any provisions of the negotiated contract or a mid-term change within the intendment of section 8(d). He did not find that the Company's action had the purpose or effect of undermining employees' section 7 rights. Finding violations of neither section 8(a)(5) nor section 8(a)(1), the Examiner recommended dismissal of the complaint.

The Board adopted the Examiner's findings of fact, but disagreed with his construction of the Act. The Board held: that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; that, in the alternative, renegotiating retirement benefits for retirees is within the contemplation of the statute because it "vitally affects active bargaining unit employees"; that the Company had "unilaterally changed" retirees' health benefits in violation of Section 8(a)(1) and (5) of the Act.[4] Accordingly, the Board ordered the Company to cease and desist from refusing to bargain collectively with the Union about adjustments in health insurance plans for retired employees, and otherwise "interfering with, restraining, or coercing employees in the exercise of" their section 7 rights. In addition, the Board ordered the Company to rescind any "unilaterally instituted" adjustment in retirees' health benefits upon request of the Union.

The sole issue in this case is whether an employer may bargain individually with retired employees about alterations in their negotiated retirement benefits, or

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[4] Board Member Zagoria dissented from the Board's Decision and Order.

whether alterations in retirees' retirement benefits are mandatory subjects of bargaining with respect to which an employer must bargain collectively at the request of the Union.

The Labor-Management Relations Act enjoins employers to bargain collectively [5] and in good faith with the bargaining agents of their employees[6] about "wages, hours, and other terms and conditions of employment." [7] It is well established, and not in dispute here, that pensions and insurance benefits to be enjoyed by employees after retirement are "wages" for the purposes of the statute, albeit deferred ones, and that insofar as they accompany a provision specifying a mandatory retirement age, as is present in this case, they are also "conditions of employment." *W. W. Cross & Company,* 77 NLRB 1162 (1948), enf'd, *W. W. Cross & Company v. NLRB,* 174 F.2d 875

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[5] Section 8(a)(5), Labor-Management Relations Act, 29 U.S.C. § 158(a)(5) (1964) provides:

> "(a) It shall be an unfair labor practice for an employer—
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> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[6] Section 9(a), Labor-Management Relations Act, 29 U.S.C. § 159(a) (1964) provides the statutory method for selection of a bargaining agent:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *".

[7] Section 8(d), Labor-Management Relations Act, 29 U.S.C. § 158(d) (1964) defines the collective bargaining obligation as:

> "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable time and confer in good faith with respect to wages, hours, and other terms and conditions of employment. * * *"

(1st Cir. 1949); *Inland Steel Company,* 77 NLRB 1 (1948), enf'd, *Inland Steel Company v. NLRB,* 170 F.2d 247 (7th Cir. 1948), *cert. denied on this issue,* 336 U.S. 960; *National Labor Relations Board v. Black-Clawson Company,* 210 F.2d 523 (6th Cir. 1954). Being mandatory, as opposed to permissive, subjects of bargaining, if a company refuses to bargain about active employees' retirement benefits when the employees' bargaining representative requests the opportunity to do so, it violates not only section 8(a)(5), but also section 8(a)(1), which prohibits employers from interfering with, restraining, or coercing employees in their section 7 right "to bargain collectively through representatives of their own choosing."[8] Furthermore, being mandatory, the matter can be pressed by either party to an impasse, or be used, under appropriate circumstances, to block an agreement or justify a strike or lockout. *See, e.g., National Labor Relations Board v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342 (1958).

However, the issue in this case is not whether retirement benefits for *active* employees are mandatory subjects of collective bargaining. The issue is, once retirement benefits have been negotiated for active employees who have retired and begun collecting benefits, whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are "employees"

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[8] Section 8(a)(1) makes it an unfair labor practice for an employer

> "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158 (a)(1) (1964).

Section 7 of the Act, 29 U.S.C. § 157 (1964), provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *"

under section 8(a)(5), changes in whose benefits must be collectively bargained with the union.[9] We find that retirees are not "employees" within the meaning of section 8(a)(5) and that the Company was under no constraint to collectively bargain improvements in their benefits with the Union.

II.

The Board found that persons who have retired from the service of an employer may be considered "employees" with respect to whom the employer must bargain collectively because, as a general proposition, coverage of the Act is not limited to persons currently in the employ of a particular employer. It is true that for many purposes the

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[9] This is not the case of an employer unilaterally abrogating contractually vested retirement benefits of retirees, as it might have been had the Company unilaterally substituted contributions to supplementary Medicare plans for the negotiated health plans, as it originally planned to do. In that event, the retirees would have had an appropriate remedy, either by invoking the grievance procedure of the contract under which they received the benefits, or by bringing an action under Section 301 of the Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964). *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Even then, however, the Company's conduct would not rise to the level of an unfair labor practice in the absence of a showing of bad faith in arbitration or a reasonable tendency of undermining the union as the bargaining agent for active employees. *See Sinclair Refining Co. v. NLRB*, 306 F.2d 569 (5th Cir. 1962); *Independent Petroleum Workers of New Jersey v. Esso Standard Oil Co.*, 235 F.2d 401 (2d Cir. 1956); *National Labor Relations Board v. Pennwoven, Inc.*, 194 F.2d 521 (3d Cir. 1952).

Nor is this case to be confused with those holding it an unfair labor practice under section 8(a)(5) for an employer to short-circuit the collective bargaining process by bypassing the union and bargaining directly with *active* employees or instituting changes unilaterally during the bargaining process. *See, e.g., National Labor Relations Board v. Katz*, 369 U.S. 736 (1962).

Moreover, we do not decide the extent to which a company violates the Act by making deceptive offers to retirees, the effect of which may be to defraud them into accepting reduced retirement benefits.

Act extends protection to persons not currently serving employers. However, by plain meaning an employer has no statutory duty to bargain collectively with respect to persons who are not "his employees."

Section 2(3) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 152(3) (1964), provides:

> "When used in this subchapter—
>
> * * * * *
>
> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, *unless this subchapter explicitly states otherwise,* and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * * [Emphasis added]."

As the Supreme Court indicated in *Phelps Dodge Corporation v. NLRB,* 313 U.S. 177 (1941), the purpose of this broad definition, which was borrowed almost wholly from the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1964), was to insure against interpretations, such as had at one time been made under the Clayton Act, that persons not employed by a particular employer were prohibited from peaceful picketing to publicize a dispute because they did not stand in the proximate relationship of employees to the employers involved. *Id.* at 191-92. In addition, it was intended to dispel any notions that labor unions had to limit the extent of their organizations to employees of a single employer. In twice emphasizing the statutory language italicized above, the Supreme Court made plain its belief that the expansive definition of "employee" in section 2(3) was to give way where "the Act explicitly states otherwise." As a particular example, the Court stated:

"In determining whether an employer has refused to bargain collectively with the representatives of 'his employees' in violation of § 8(5) [now section 8(a)(5)] and § 9(a) it is of course essential to determine who constitute 'his employees.' One aspect of this is covered by § 9(b) which provides for the determination of the appropriate bargaining unit." *Phelps Dodge Corp. v. NLRB, supra,* at 912.

There was nothing strained or unnatural in this interpretation. The statute itself plainly provides that it shall be an unfair labor practice for an employer

"to refuse to bargain collectively with the representatives of *his employees,* subject to the provisions of section 9(a)."

This construction is, of course, unaffected by those cases on which the Board relies heavily, making it an unfair labor practice under Section 8(a)(3) of the Act for an employer to discriminate in the hiring of applicants for employment, who were not in the company's employ,[10] registrants at hiring halls,[11] employees of a company taken over by a "successor employer,"[12] employees who have quit,[13] and other persons not currently employed and outside the bargaining unit. Section 8(a)(3) forbids "discrimination in regard to hire or tenure." If prospective employees or those whose employment has ceased because of illegal discrimination were not regarded as within its

[10] *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941). *Accord, NLRB v. Louisville Chair Co.,* 385 F.2d 922, 925 (6th Cir. 1967), *cert. denied,* 390 U.S. 1013.

[11] *Local 872, International Longshoremen's Association,* 163 NLRB 586 (1967); *Local 1351, Steamship Clerks etc. v. NLRB,* 329 F.2d 259 (D.C. Cir. 1964), *cert. denied,* 377 U.S. 993.

[12] *Chemrock Corp.,* 151 NLRB 1074 (1965). *Chemrock* deals with facts and issues entirely different from those present here, however to the extent of any apparent inconsistency, we decline to follow it.

[13] *Goodman Lumber Co.,* 166 NLRB No. 48 (1967).

terms, a refusal to hire for unlawful reasons, and unlawful discharge, could never be unfair labor practices under this section.

The Board itself has recognized this distinction between the use of the word in section 8(a)(3) and (5):

> "We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited * * * which hold that the antidiscrimination provisions of Section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The antidiscrimination provisions refer to 'employees' *generally*, whereas unlike these provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for *'his' employees.* [Emphasis in original]" *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163 (1959).

We are similarly unpersuaded by the analogy made by the Board between the word "employee" as that word has been construed for the purposes of Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 (1964), *see, e.g., Blassie v. Kroger*, 345 F.2d 58, 68-71 (8th Cir. 1965), and the word "employee" as it appears in section 8(a)(5). Section 302 is a criminal provision, making it a misdemeanor for an employer to make payments to a union representing his employees. Section 302(c), under which *Blassie, supra,* was decided, exempts from the operation of the section employer contributions to, *inter alia*, employee trust funds, among which are pension and retirement plans. Not to regard retirees as employees for the purposes of that section would frustrate the purpose of retirement trusts, which have been designated as mandatory subjects of bargaining, by making distributions to retirees from them illegal. The Board's argument that it is an "anomaly" to treat the word differently under the two sections is itself an anomaly.

We also reject the Board's argument that the interpretation of the word "employee" by the Internal Revenue Service under Sections 401(a) and 501(c)(9) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 401(a) & 501(c)(9) (1964), is dispositive of the issues in this case. *See* 26 CFR § 1.401, *as revised,* Jan. 1, 1969.

We find that the general definition of "employees" in section 2(3) is superseded by the explicit statement in section 8(a)(5), and that an employer has a duty to bargain collectively only with the representatives of *his employees.*

We now turn to the issue whether retired employees are employees of the Company for the purposes of section 8(a)(5).[14] Upon this issue the record is clear. Retirement with this Company, as with most other companies, is a complete and final severance of employment. Upon retirement, employees are completely removed from the payroll and seniority lists, and thereafter they perform no services for the employer, are paid no wages, are under no restrictions as to other employment or activities, and have no rights or expectations of re-employment. For these reasons, as will be discussed below, the Board has consistently held that retired employees have no right to vote in representation elections, even when the employer has a right, and they have some expectation, of being recalled to work. *W. D. Byron & Sons,* 55 NLRB 172, 174-75 (1944).

The fact that retired persons may continue to receive

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[14] Although the Board's interpretation of the term "employee" is entitled to some weight, *Local No. 207, International Association of Bridge Workers v. Perko,* 373 U.S. 701, 706 (1963); *National Labor Relations Board v. Hearst Publications, Inc.,* 322 U.S. 111, 130 (1944), the Board made no finding in this case that retirees are employees within the meaning of the Act. In prior cases, however, the Board has expressly found that retirees are not employees for the purposes of the more expansive section 2(3). *See, e.g., Public Service Corporation of New Jersey,* 72 NLRB 224, 229-30 (1947).

pensions after permanently leaving the service of an employer does not entitle them to continued status as employees. Indeed, the receipt by them of retirement benefits further emphasizes the finality of their employment severance.

We find that persons who have retired from the service of an employer are no longer "his employees."

III.

In addition to limiting the employer's bargaining obligation to "his employees," section 8(a)(5) conditions the bargaining obligation on the provisions of section 9(a), which provides:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining * * *"

It has repeatedly been held that the scope of the bargaining unit controls the extent of the bargaining obligation, and that a union has no right to demand, over an employer's objection, a change in the unit. *See, e.g., Eastern Greyhound Lines v. NLRB*, 337 F.2d 84 (6th Cir. 1964); *Douds v. International Longshoremen's Association*, 241 F.2d 278 (2d Cir. 1957). This second condition, therefore, demands a resolution of the issue whether retirees are in the bargaining unit.

As was indicated above, the unit certified by the Board as appropriate was composed of "employees of the Employer's plant * * * working on hourly rates, including group leaders who work on hourly rates of pay. * * *" Retirees were not mentioned. Thus, the Board certified a bargaining unit composed only of presumably active

... or entitled to ... *Supply Corporation*, 137 ... 223 (1962); *Public Service Corporation of New Jersey*, 72 NLRB 224, 229-30 (1947); *J. S. Young Company*, 55 NLRB 1174 (1944); *W. D. Byron & Sons*, 55 NLRB 172, 174-75 (1944).

In *Public Service Corporation of New Jersey, supra*, 72 NLRB at 229-30, for example, the Board stated:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers."

In *W. D. Byron & Sons, supra*, 55 NLRB *at* 174-75, the Company had a policy of laying off and pensioning employees who, due to advanced age, could not perform their work well, but the Company retained the right to recall them for light work when it became available. When the pensioners sought to be included in the bargaining unit, the Board stated:

> "None of the seven men laid off and pensioned in July 1943 has since been recalled to work, as no light work has been available at the tannery in this 6-month period. The Company does not know when suitable work will be available. Since it appears that the pensioners have little expectation of active employment at the tannery, we shall exclude them from the bargaining unit of regular production and maintenance workers."

See also, *Denver-Colorado Spring-Pueblo Motor Way*, 129 NLRB 1184, 1185 (1961), where the Board held that employees are included in proposed units "only if they spend a 'major portion of their time' in tasks alike or similar to the ones of the other employees in the unit." The Board defined "major portion of their time" as 50 percent or more.

Yet, the Board holds in this case that retirees should be included in the bargaining unit for the purpose of renegotiating their retirement benefits because this subject "vitally affects" active bargaining unit employees. The Board indicates that active bargaining unit employees are affected in essentially three ways.

First, the Board states that "the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts." We agree. Congress has provided a remedy, however, for breaches of contracts regarding retirement benefits, and, as we have pointed out below, n. 9, *supra* at p. [10], every breach of a collective bargaining contract is not, per se, an unfair labor practice. In any event, the issue in this case is not whether contract benefits can be legally enforced, but whether contract benefits for retirees must be re-opened at the request of the Union after the employees to whom these benefits are payable have retired.

Second, the Board indicates, and we agree, that active employees have a "selfish" interest about bargaining about retirement benefits, since these benefits are "an integral part of their total compensation." Leaving aside their altruistic sentiments, what active employees are concerned about are *their own* retirement benefits. It is not necessary to extend the bargaining obligation to persons al-

ready retired in order to insure current employees the right to negotiate through their bargaining representative their own retirement benefits to take effect after their retirement.

Third, the Board states that changes in retirement benefits for retired persons should be made mandatory subjects of collective bargaining because such changes "affect the availability of employer funds available for active employees." This, again, is of course true. However, does this mean that all employer salaries, including those to supervisory and managerial personnel, are mandatory subjects which must be collectively bargained with the Union? Moreover, all employer expenditures, from dividends to capital expenditures, affect, however obliquely, the availability of employer funds for active unit employees. Surely the Board does not contend that these are mandatory subjects of bargaining.

Congress decreed that the bargaining agent's authority extends only to bargaining for "all of the employees in a unit appropriate for such purposes." The appropriate bargaining unit has economic incidents which the Board simply cannot modify by fiat or enlarge by sympathy.

We find that retired employees are not within the bargaining unit, and that under the plain meaning of the Act, employers have no statutory duty to re-negotiate with their unions improvements in retired employees' pension benefits.

IV.

Not only are the Board's arguments without support in the language of the Act, they are in defiance of its purpose. The purpose of federal labor legislation is to reconcile and, insofar as possible, equalize the power of competing economic forces within the society in order to en-

courage the making of voluntary agreements governing labor-management relations and prevent industrial strife. *See* Section 1, National Labor Relations Act, 29 U.S.C. § 151 (1964); Section 1, Labor-Management Relations Act, 1947, 29 U.S.C. § 141 (1964); *Consolidated Edison Company v. NLRB*, 305 U.S. 197, 221-22, 236 (1938); *National Labor Relations Board v. American National Insurance Company*, 343 U.S. 395, 401-403 (1952). Its purpose is not artificially to create or manufacture new economic forces. Thus, the Act "leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free." *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 183 (1941).

Retired employees have no economic or bargaining power within this system. Their financial security derives from past economic power pragmatically and prudently exercised. Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them. Section 301, Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964). Nor may retirees demand that they be increased. Changing economic facts pertaining to the employer's business or the general economy occurring after an employee retires cannot enhance or depreciate the value of his prior services or justify periodic post-retirement negotiations. The employer cannot retroactively increase his prices to compensate for these increased benefits, or fund expenses which are, as these would be, open-ended.

Moreover, retirees given the bargaining power would lose their economic security, for just as surely as an employer may increase benefits, in bargaining, he may take them away. Even if retirees were given the statutory

power to periodically renegotiate pension benefits previously earned, the union would be an inappropriate bargaining vehicle. It is not at all unlikely that a union negotiator presented with the opportunity to advance employees' wages at the expense of retirees' pensions, would choose to favor his constituents at the expense of the honorary union members, who retain no voting power.

We have studied with care the evidence in the *amicus curiae* briefs tending to show that the practice in industry is to bargain on retired employees' benefits. This voluntary practice demonstrates the increasingly humanitarian quality of the labor-management relationship, and is to be encouraged. However, it does not form a basis on which this Court can alter the statutory language, or undermine the Congressional intent.

V.

The Company's petition to review is granted, and the Labor Board's cross-application to enforce is denied.

APPENDIX B.

ORDER OF THE COURT OF APPEALS.

(Filed June 10, 1970.)

No. 19,875.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL UNION NO. 1, ALLIED CHEMICAL AND
ALKALI WORKERS OF AMERICA,

Intervenor.

BEFORE: WEICK, CELEBREZZE and BROOKS, Circuit Judges.

On petition for review and cross-petition for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to review is granted and the cross-petition to enforce is denied.

It is further ordered that Petitioner recover from Respondent the costs on appeal, as itemized below.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX C.

ORDER OF THE COURT OF APPEALS DENYING REHEARING.

(Filed July 31, 1970.)

(Caption as on preceding page.)

Before: Weick, Celebrezze and Brooks, Circuit Judges.

Respondent's petition for rehearing having come on to be considered, and of the judges of this Court who are in regular active service only Judges Edwards and McCree having favored ordering consideration en banc.

It Is Ordered that the petition be, and it is hereby denied.

Entered by Order of the Court,
Carl W. Reuss,
Clerk.

APPENDIX D.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Dated July 9, 1969.)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 8-CA-4202

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION

and

LOCAL UNION NO. 1, ALLIED CHEMICAL
AND ALKALI WORKERS OF AMERICA.

DECISION AND ORDER.

The complaint in this proceeding alleges that Respondent (the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally modifying a negotiated hospitalization and surgical insurance plan for retired employees which was part of an outstanding collective-bargaining agreement between Respondent and the Charging Party (the Union).

On April 14, 1967, Trial Examiner James V. Constantine issued a Decision finding that Respondent's conduct did not transgress the Act and recommending that the complaint be dismissed. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs.[1]

[1] The Respondent's and the Charging Party's requests for oral argument are hereby denied because the record, including the exceptions and briefs, adequately presents all of the issues.

The Board has reviewed the Trial Examiner's rulings made at the hearing and finds that no prejudicial error was committed.[2] Those rulings are affirmed. The Board has also considered the Trial Examiner's Decision, the exceptions and briefs of the parties, the briefs of the amici curiae,[3] and the entire record. We hereby adopt the Trial Examiner's findings and conclusions only to the extent that they are consistent with this Decision.

I. The Union has represented employees in an appropriate unit at Respondent's Barberton, Ohio, plant since 1949. In 1950 the parties negotiated a contract which included provisions for a pension and a hospitalization and surgical insurance plan. They also reached an oral understanding that retired employees could elect to participate in the insurance plan by contributing the total cost of insurance premiums which would be deducted from their pension payments. Doubtless this was a meaningful benefit because it enabled retired employees to enjoy health insurance protection at the group rate. Except for a unilateral improvement made by Respondent in 1954, this oral understanding was effectuated without change for 9 years.

In 1959 the parties negotiated an improvement in the insurance plan for retired employees by increasing the maximum amount of daily hospitalization benefits. The

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[2] The Trial Examiner inadvertently stated in his Decision that the hearing was held in Mansfield, Ohio. In fact it was held in Akron, Ohio.

[3] *Amicus curiae* briefs were filed urging approval of the Trial Examiner's Decision by the Chamber of Commerce of the United States and the National Association of Manufacturers. Briefs urging reversal of the Trial Examiner's Decision were filed by the American Federation of Labor and Congress of Industrial Organizations, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, the United Steelworkers of America, AFL-CIO, and the Amalgamated Transit Union, AFL-CIO.

parties also reduced to writing their understanding respecting the participation rights of retired employees.[4]

During contract negotiations in 1962, the insurance plan was improved when Respondent agreed to contribute $2 per month towards the cost of insurance premiums for employees who retired after June 27, 1962, and who elected to participate in the plan. In these negotiations the parties also agreed to make age 65 the mandatory retirement age.

In their negotiations for a new labor contract in 1964, the parties again bargained about insurance benefits for retired employees. The Respondent agreed to increase its monthly contribution for each participating retired employee from $2 to $4 per month. However, anticipating Congress' enactment of Medicare legislation, the parties agreed that upon that occurrence the Respondent could reduce its contribution by the amount of the 1964 increase (i.e., $2 per month).

On November 23, 1965, following the enactment of Medicare and during the term of their outstanding collective-bargaining agreement, the Union asked the Respondent to engage in mid-term bargaining for the purpose of negotiating insurance benefits for retired employees of a type not available under Medicare. Respondent's industrial relations director, Rogers, took the request under advisement. Several months went by without any response. Then in March 1966, the Union reminded Respondent of the earlier request for mid-term bargaining.

At a meeting held on March 21, 1966, Respondent gave its answer. First, Respondent said that it intended,

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[4] In these 1959 negotiations Respondent apparently challenged the right of the Union to bargain about such benefits for retired employees. Nonetheless, Respondent did bargain with the Union about this subject in 1959 and in subsequent contract negotiations.

because of the intervening passage of Medicare, to reclaim its contribution of the extra $2 per month for retired employees under the terms of the 1964 contract beginning July 1, 1966, the effective date of Medicare. Second, Respondent said that it intended to cancel the negotiated health insurance plan for retired employees because, in Respondent's opinion, the enactment of Medicare made this insurance useless. (Respondent also contended that a nonduplication of benefits provision in the insurance plan precluded payment under the negotiated health insurance plan of those benefits which were also provided by Medicare.[5]) Third, Respondent announced that it had decided to contribute $3 a month for each retired employee to be applied towards the cost of subscribing to supplemental Medicare coverage. Fourth, Respondent rejected the Union's request to bargain for a supplementary insurance plan and challenged the Union's right to bargain for retired employees at all.

The Union conceded Respondent's contract right to reduce its contribution, but challenged Respondent's right unilaterally to abrogate the provisions of the contract entitling retired employees to participate in the health insurance plan and requiring the Respondent to contribute a minimum of $2 per month for this purpose.

Two days later, on March 23, 1966, Respondent told the Union that, having reconsidered its position, Respondent would leave the health insurance plan for retired employees "intact." Instead, Respondent said that it intended to send letters to retired employees announcing that they could choose to withdraw individually from the negotiated health insurance plan and, in lieu thereof, that

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[5] The Charging Party challenges the correctness of this interpretation of the insurance plan. But it is unnecessary to, and we do not, reach this question.

Respondent would contribute $3 per month towards supplemental Medicare premiums. The Union objected to this proposed action, asserting the right to bargain about any change in the contract concerning the health insurance plan. The Respondent again refused to bargain with the Union for a supplementary insurance plan.

The next day, March 24, Respondent sent the aforementioned letters to retired employees with the result that approximately 15 of 190 canceled their participation in the negotiated health insurance plan. In response to the Respondent's actions, the Union filed the instant charges.

In October 1966, Respondent proposed that the termination date of the existing labor agreement be extended from October 20, 1967, to October 19, 1970. Included in that proposal was a clause reiterating Respondent's position taken in March 1966, which the Union rejected.

II. The Trial Examiner found the aforementioned facts, which are not in controversy. He then recommended dismissal of the complaint for the reason that, in his opinion, retired employees are not embraced by the policies of the statute nor by its definition of "employee," [6] and, therefore, that the Respondent was under no statutory duty to refrain from unilateral action with respect to retired employees. While acknowledging that pensions and health insurance benefits are statutory subjects of bargaining, he concluded, nonetheless, that the obligation which Congress has laid on employers and unions to bar-

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[6] Section 2 (3). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. * * *"

gain about these subjects abruptly ends on the date that employees retire from active employment.

In one significant respect, the Trial Examiner's findings are not clear to us. He found at the outset of his Decision that Respondent had "refused to meet and confer with the Union regarding changes unilaterally * * * made by Respondent,"[7] yet he concluded his Decision with the finding that these unilateral changes did not modify the collective-bargaining contract "since employees [meaning retired employees] were free to decline"[8] the Employer's offer which constituted the unilateral change.

We disagree both with his interpretation of the statute and with his conclusion that Respondent's unilateral change in the insurance plan for retired employees was not a modification of the subsisting collective-bargaining agreement. From our study of the Labor Act, its policies, its legislative and decisional history, we conclude: First, that retired employees are "employees" within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits; second, that bargaining about changes in retirement benefits for retired employees is in any event within the contemplation of the statute because of the interest which active employees have in this subject; and, third, that bargaining about such benefits is fully consonant with the statutory requirement that "wages, hours, and other terms and conditions of employment" be subject to the institution of collective bargaining envisioned by the Act.

III. The statutory question raised here is an important one because of its obvious significance to ever-increasing numbers of retired workers and their dependents. It

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[7] Trial Examiner's Decision 196-67, p. 5.

[8] Trial Examiner's Decision 196-67, p. 9.

is no less important to current employees. That it arises for the first time more than 30 years after the initial passage of the Labor Act underscores emerging patterns in collective bargaining which have resulted in earlier retirement for employees on terms which include both retirement income and protections against the health hazards of advancing age.[9] At the same time the life expectancy for Americans is greater than ever before [10] which, in turn, increases their reliance on retirement benefits.

It has long been settled that the statute enjoins employers and unions to bargain in good faith about pensions and health insurance benefits to be enjoyed by employees upon their retirement. *W. W. Cross & Co.*, 77 NLRB 1162, 1163-1164, enfd. 174 F.2d 875, 877-878 (C.A. 1); *Inland Steel Company*, 77 NLRB 1, enfd. 170 F.2d 247 (C.A. 7), cert. denied 336 U.S. 960. It is equally settled that unilateral changes in negotiated pension and insurance plans violate the statute. See *General Motors Corp.*, 81 NLRB 779, 780-781, enfd. 179 F.2d 221 (C.A. 2); *The Scam Instrument Corp.*, 163 NLRB No. 39, Trial Examiner's Decision at pages 7-8, enfd. 394 F.2d 884 (C.A. 7); *Charles E. Honaker*, 147 NLRB 1184, 1194. The single question to be decided here is whether these principles apply to such benefits for employees who have already retired.

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[9] See Welfare and Pension Plans Disclosure Act, 1958, Section 2(a), 72 Stat. 997, 29 U.S.C. Section 301(a):

> The Congress finds that the growth in size, scope, and numbers of employee welfare and pension benefit plans in recent years has been rapid and substantial; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest: that they have become an important factor affecting the stability of employment and the successful development of industrial relations; * * *.

[10] Bureau of the Census, *Statistical Abstract of the United States* (1967), p. 53.

Many unions and employers now bargain about pension and health benefits for retired employees, reflecting a "wide-spread understanding of the law shared in industrial circles and among members of the labor relations bar." [11] Indeed, the "trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life * * *." *Blassie v. Kroger Co.*, 345 F.2d 58, 69 (C.A. 8). By enacting Medicare, Congress acknowledged and responded to the serious health needs of older Americans,[12] and, significantly, the Medicare amendments to Social Security were made available to already retired beneficiaries as well as to future beneficiaries.[13]

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[11] *United Drill & Tool Corp.*, 28 L.A. 677, 685 (Archibald Cox, arbitrator):

> [M]any companies, including the big steel and auto concerns, have promised to pay the more liberal pensions not only to those who are to retire in the future but also to those who have retired in the past. * * * Common practice can hardly change the law but it does reflect * * * a wide-spread understanding of the law shared in industrial circles and among members of the labor relations bar.

See *Pacific Maritime Association*, 28 L.A. 600, 607-608. See also p. [43], *infra*.

[12] Health Insurance for the Aged Act, 79 Stat. 290, 42 U.S.C. Section 1395.

[13] See S. Rep. No. 404, Part I, 89th Cong., 1st Sess. 23-24 (1965):

> In past amendments to the Social Security Act, when new programs have been developed or when significant changes have been made to meet a national need, the Congress has followed the practice of extending the new or enhanced benefits not only to those who will become eligible for them in future years but also to the individuals then currently on the rolls. This has been done, of course, with the knowledge that the current beneficiaries on the rolls have not made contributions specifically for the increased benefits or the new benefits then being provided. Of course, this means that the benefits going to the already-retired group, represent in a sense an "unfunded" liability which has to be met out of future contributions. However, the practice has always been to cover the present beneficiaries.

(*Continued on following page*)

To the Trial Examiner the issue of this case turns simply on whether retired employees fall within the statutory definition of "employee." Finding that they do not, he concludes that no bargaining obligation is owed to them from the day that they retire, even with respect to changes in benefits which were negotiated on their behalf in the past when they were actively employed.

His Decision rests upon an analysis of two distinct lines of cases which he loosely interweaves. First, he relies upon representation cases in which the Board has held that retired employees are not eligible to vote in Board-conducted elections to select a bargaining agent. *Public Service Corporation of New Jersey,* 72 NLRB 224, 229-230.[14] In these cases the Board decided only eligibility issues, intimating no opinion on the broader question involved here. Nevertheless, the Trial Examiner reasons that "if retired persons are excluded from a unit for the purpose of voting for a representative of that unit, manifestly they should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit." This conclusion fails to consider the nature of eligibility determinations which are not intended to be definitive rulings on employee status for all purposes. Eligibility "hinges on whether the employees have suffi-

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Basic to it is the recognition that the problem which such new legislation is designed to meet exists not only for those who will become eligible in the future but equally for present beneficiaries. *It may be noted that the same practices are often followed under private pension plans; namely, to extend benefit liberalizations to existing pensioners on the rolls when doing so for future pensioners.* [Emphasis supplied.]

[14] The Board there carefully noted that "even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers." 72 NLRB at 230.

cient interest in the terms and conditions of employment to warrant their participation in the election of a collective-bargaining agent." *H. P. Wasson and Company,* 105 NLRB 373, 374. Even regular, active, full-time employees, who are hired after the election eligibility date, are normally not eligible to vote,[15] yet they are unquestionably "employees" about whom the employer and union have a duty to bargain in good faith. Conversely, persons who are not actively employed may be eligible to vote in some circumstances. Among these are persons on military leave, sick leave, or layoff. One, on the one hand, may be an active employee and not be eligible to vote, while, on the other hand, one may be an inactive employee and remain eligible to vote.

A more pertinent line of cases cited by the Trial Examiner involves unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment[16] and registrants at hiring halls[17]—who have never been hired in the first place—as well as persons who have quit[18] or whose employers have gone out of business[19] are "employees" embraced by the policies of the Act. The Trial Examiner distinguishes these cases on the ground that in each of them "the person involved—unlike the pensioners here—was a member of the working class" or on the ground that in each of those cases there was "the reasonable prospect that an employer-employee status was capable of being developed." These are legally tenuous distinctions drawn

[15] *Wayne Knitting Mills, Inc.,* 1 NLRB 53, 55.

[16] *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 182-187.

[17] *Local 872, International Longshoremen's Association,* 163 NLRB No. 69.

[18] *Goodman Lumber Co.,* 166 NLRB No. 48.

[19] *Chemrock Corporation,* 151 NLRB 1074, 1076-79.

from cases dealing with distinctly different issues. We believe, on the contrary, that these cases support the conclusion that retired persons are "employees" under the policies of the Act. They plainly show that the Act's protection is not narrowly limited to those who are recorded on the employer's current payroll. Indeed, employees, who have been actively employed for a sufficient number of years to have earned a pension, have deep legal, economic, and emotional attachments to a bargaining unit which measurably exceed the attachments of others who have been held to be employees. If one can be an "employee" *before* he has been hired, or *after* his employer has gone out of business, or, even while he is on active military duty thousands of miles away, we cannot agree that one who has spent his productive years in the bargaining unit is beyond the protective ambit of "employee" rights.

When an employee retires from the bargaining unit, most of the threads which once bound him to the unit are severed, except those which affect his retirement rights. But his retirement status is a substantial connection to the bargaining unit, for it is the culmination and the product of years of employment. To accept the Trial Examiner's view that a retired employee is a legal stranger to the bargaining unit would require us to overlook obvious realities of human behavior as well as clear national policies which reject the view that workers are human machines who,[20] when their economic utility diminishes, may be cast aside and forgotten.[21]

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[20] Clayton Act, Section 6, 38 Stat. 731, 15 U.S.C. Section 17: "The labor of a human being is not a commodity or an article of commerce."

[21] See, e.g., Age Discrimination in Employment Act, 1967, Section 2, 81 Stat. 602, 29 U.S.C. Section 621; Welfare and Pension Plans Disclosure Act, 1958, Section 2, 72 Stat. 997, 29 U.S.C. Section 301; Executive Order 11141, 29 Fed. Reg. 2477 (1964).

Compensation for employment need not be synchronous with the performance of labor. Current services may be rewarded by benefits which arise (or continue) in the future,[22] and past services may be retroactively compensated with additional benefits.[23] Thus, it is not "active" employee status at the time of enjoyment of a negotiated benefit that controls whether it falls within "wages * * * [or] other terms and conditions of employment." The critical question is whether the benefit is founded on employment—past or present.[24] The health insurance plan here was negotiated for active employees to be enjoyed upon retirement, and its terms relate back to their active employment. For retired employees, the benefits paid to them in retirement are part of the return on their investment of a lifetime of labor. In some respects, an employee's retirement from active employment and his separation from the daily association with fellow workers is the very time when he is most vulnerable economically and most needs representation. This is the point at which his economic alternatives are most limited because of his age. It would virtually stand the Act on its head to hold that his employer is free to deal with him unilaterally and that the union may not represent him with respect to changes in the very plan which it negotiated for him.

The Board and courts have long held that a rigid definition of "employee" was not intended by Congress. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177. In *Briggs*

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[22] For example, pensions, *Inland Steel Co., supra,* and health, accident, and life insurance, *W. W. Cross, supra.*

[23] See, e.g., *Bergen Point Iron Works,* 79 NLRB 1073, 1074 (retroactive application of contract terms).

[24] As the court stated in the *W. W. Cross* case, the term "wages" comprehends "* * * emoluments resulting from employment" and "* * * embraces within its meaning direct and immediate economic benefits flowing from the employment relationship." 174 F.2d 875, 878 (C.A. 1).

Manufacturing Company, 75 NLRB 569, 571, the Board held that:

> This broad definition covers, in addition to employees of a particular employer, also employees of another employer, or former employees of a particular employer, or even applicants for employment.

And the Supreme Court said in *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, 129, 130:

> * * * the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by *underlying economic facts* rather than technically and exclusively by previously established legal classifications. * * *
>
> *That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection, protection ought to be given."* [Emphasis supplied.]

The Court added:

> It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all of the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus ac-

quired must be brought frequently to bear on the question who is an employee under the Act.

The lesson of the precedents, therefore, is that employee status is not a question to be resolved by the mechanical application of *a priori* definition; it requires an appraisal of the "underlying economic facts" with "reference to the purpose of the Act." *Id.* For the reasons stated above, the "underlying economic facts" of this case persuade us that Congress intended to confer employee status on retired employees with respect to health insurance plans affecting them.

Our conclusion that retired employees' retirement benefits are embraced by the bargaining obligation of Section 8(a) (5) is also supported by other provisions of the statute. Section 302(b) (5) (B) requires employer contributions to joint labor-management pension and health plans to be held in trust and to be administered by an equal number of employer and employee trustees. Congress' command that unions participate in the administration of such plans for retired employees through union appointed trustees requires unions to act as the "representatives" of retired employees. See *U. S. v. Ryan,* 350 U.S. 299. Moreover, in decisions interpreting the term "employees" in Section 302(b), appellate courts have held that it includes both "current employees and persons who were current employees but are now retired." *Blassie v. Kroger Co.,* 345 F.2d 58, 70 (C.A. 8); *Teamsters, Local 688 v. Townsend,* 345 F.2d 77 (C.A. 8); *Garvison v. Jensen,* 355 F.2d 487 (C.A. 9). The Trial Examiner's Decision would create the anomaly that retired employees are not "employees" whose ongoing benefits are fit subjects of bargaining under Section 8(a) (5), while under Section 302(b) they are "employees" for the purpose of administering the same health insurance benefits. It would

create the further anomaly that a union would not be entitled to act as the representative of retired employees under Section 8(a)(5), while subject to an explicit statutory duty to act as their representative under Section 302(b).[25]

We conclude, therefore, that retired employees are "employees" and that changes in benefits which are rooted in their years of active employment are encompassed within the bargaining obligation of the Act.

IV. Independent of our finding that retired workers are "employees," we also conclude that the subject of retirement benefits for retired employees is embraced by the bargaining obligation of the statute because it vitally affects active bargaining unit employees. At the very least, the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts, and Respondent's unilateral modification of its outstanding collective-bargaining agreement might itself be dispositive of this case. See [pp. 47, 48] *infra*. But the interest of current employees is broader than assuring faithful contract compliance.[26]

Providing adequate economic security during retirement is a continuing concern of employers and employees.[27] For employers, the promise of retirement bene-

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[25] The Internal Revenue Service has also concluded, in regulations interpreting the Revenue Code of 1954, that a benefit plan "is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees as well as present employees. * * *" Internal Revenue Service Regulations, Section 1.401-1(b)(4), 21 Fed. Reg. 7277 (1956).

[26] See *Upholsterers v. American Pad Co.*, 372 F.2d 427 (C.A. 6).

[27] See generally Senate Report No. 1734, Welfare and Pension Plan Investigation, pages 11-13, 84th Congress, 2nd Session

(*Continued on following page*)

fits aids in obtaining good workers, retaining them, and easing their acceptance of retirement.[28] For active employees, provisions for pension and health benefits after retirement are an integral part of their total compensation. *Inland Steel Company,* 77 NLRB 1, 4-5; *W. W. Cross & Co.,* 77 NLRB 1162, 1164, fn. 5. To them retirement benefits may be viewed as a wage increase foregone, "deferred wages" or "human depreciation." [29] Active employees, in contemplation of whether their own health needs will be adequately met upon their future retirement, have a selfish as well as a compassionate interest in bargaining about the adequacy and the administration of benefits for retired employees.

The parties to this case agreed in 1962 to mandatory retirement at age 65. An active employee's morale and his willingness to accept such retirement may be significantly influenced by the adequacy of negotiated, post-retirement health insurance to meet rising costs in the future. Thus, in bargaining about mandatory retirement and pension eligibility dates, the flexibility or inflexibility

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(1956); President's Committee on Corporate Pension Funds, *Public Policy and Private Pension Programs,* pages 1-2 (GPO, 1965); Harbrecht, *Pension Funds and Economic Power,* pages 6-10 (The Twentieth Century Fund, 1959); Kittner, *Health Insurance and Pension Plan Coverage in Union Contracts,* 85 Monthly Lab. Rev. 274-277 (March 1962).

[28] See Strong, *Employee Benefit Plans in Operation,* pages 1-9 (BNA, 1951); Hickey, *The Establishment and Administration of Pension Plans in the Labor Relations Process,* 18 Vanderbilt L.R. 151, 157-158; Harbrecht, *Pension Funds and Economic Power,* pages 74-91.

[29] See Harbrecht, *Pension Funds and Economic Power,* pages 91-99. However, we need not appraise the various differing conceptual approaches to retirement benefits other than to note they all implicitly recognize the employment connection of these benefits. See, Harbrecht, *op. cit.*; Ridgley, *The Report of the President's Cabinet Committee on Private Pension Plan Regulation: An Appraisal,* 63 Mich. L.R. 1258, 1264.

of retirement benefits is a factor which must enter the mix of considerations which will lead to agreement upon an overall retirement program.

It is not uncommon to group active and retired employees under a single health insurance contract with the result that "* * * active and retired rates [are] all combined in one rate or the retiree rate [is] subsidized by the actives." Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273, 282 (1966). In such a combined plan for active and retired employees, like the plan in this case, it is the size and experience of the entire group which may determine insurance rates. In this respect the active employees could also benefit from the membership of retired employees in the group whose participation enlarges its size and might thereby lower costs per participant. Moreover, it is evident that changes in retirement benefits for retired employees affect the availability of employer funds for active employees. Therefore, the impact of decisions on such matters on active employees is direct and immediate.

For these reasons, we also conclude that bargaining about changes in benefits for retired employees is an appropriate subject for bargaining because of its inextricable relationship to and impact on the wages, hours, and working conditions of those actively employed in the bargaining unit.

V. Our dissenting colleague and the Respondent broadly challenge whether collective bargaining is a suitable means for resolving health and welfare questions affecting retired employees. Reduced to essentials, their position is that, once consummated, a collectively bargained plan of retirement benefits is frozen and immutable with respect to employees who have retired, unless an employer chooses to make changes unilaterally or volun-

tarily agrees to bargain over changes. This position is the antithesis of the statute's design that the collective-bargaining process should be a continuing one in which the parties share responsibility for the formulation, the execution, and the results of their agreement. Because the parties could agree in advance upon formulas which would provide for "flexible treatment" [30] of their retirement programs in anticipation of future contingencies,[31] it would be anomalous to hold that the statute does not encourage resort to collective bargaining in response to specific needs as they arise in the life of a retirement program.

Forced reliance on fixed, preretirement formulas has shortcomings which may lead to disappointing results in the operation of a plan. There may be a variety of changes in the experience of the covered group or in the operation or administration of the plan itself which the parties cannot foresee. The changing value of the dollar, rising medical costs, and other economic developments might alter the real level of benefits envisaged by the original formula. The parties may also reappraise their feelings as to the fair economic share owing to retired workers, just as society itself periodically reexamines its commitments to the elderly. In addition, insurance and health care plans are constantly developing new features and refinements.

There is also the impact of expanding government social welfare programs on private health plans. Recently, private health plans had to be meshed with Medicare in order to avoid duplication and to tailor supplemental,

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[30] *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 409.

[31] In anticipation of a long-term inflationary cycle, the parties might, for example, provide for an annual benefit increment of a certain percentage of the basic benefit or an increment tied to the cost-of-living index.

private coverage to needs of the particular employer and his employees. See Foust, *Effect of Medicare on Privately Bargained Plans,* 19 N.Y.U. Conf. on Labor 273-285; *Medicare and Negotiated Health Insurance for Workers,* 88 Monthly Lab. Rev. No. 9, pp. iii-iv (Sept. 1965); *Developments in Industrial Relations,* 89 Monthly Lab. Rev. No. 4, p. 420 (April 1966). This was of course the very problem which gave rise to the instant case.

With respect to new problems which arise under a health insurance plan for retired employees, collective bargaining is not only a suitable method for exploring different solutions, but it is probably the most rational and effective method. A plan which has its inception in the collaborative process of a labor-management agreement reflects the assumptions, arguments, and aspirations—as well as the compromises—of the parties to that process. While the process of collective bargaining does not guarantee that its agreements will be wise, the process does help to assure the acceptability of those agreements because they were reached through the participation and the commitment of the parties most affected. Moreover, to deny collective bargaining a role in the development of health benefits plans for retired employees might undermine their viability. These private plans provide an important supplement to governmental social welfare programs,[32] and an effective method of dispute settlement will contribute to their purposefulness.

Collective bargaining is a dynamic institution. It flexibly adapts to new challenges to industrial peace. As the Court of Appeals for the First Circuit has held, "* * * Congress did not intend to restrict the duty to bargain

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[32] See President's Committee on Corporate Pension Funds, Public Policy and Private Pension Programs, pages 22-25 (GPO 1965).

collectively only to those subjects which up to 1935 had been commonly bargained about in negotiations between employers and employees * * *"; rather it meant to compel bargaining "* * * with respect to any [employment] matters which might in the future emerge as a bone of contention between them. * * *" *W. W. Cross & Co. v. N.L.R.B.*, 174 F.2d 875, 878 (C.A. 1).[33] Thus, an examination of current practices and trends in negotiations is relevant in determining what is a mandatory subject of bargaining. "Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective-bargaining process." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211.

Bargaining on benefits for workers already retired is an established aspect of current labor-management relations. The United Auto Workers, the United Steelworkers, and the Amalgamated Transit Union, *amici curiae*, have cited many instances in which bargaining increases in benefits have been obtained for retired workers. Several examples of collective bargaining on the integration of Medicare into private health plans can be found in 89 Monthly Labor Rev. No. 4, page 420 (April 1966). See also Foust, *Effect of Medicare on Privately Bargained Plans*, 19 N.Y.U Conf. on Labor 273-285 (1966). This is pragmatic recognition that adjustments in retirement benefits for those already retired are suitable subjects for the collective-bargaining process. In our view holding these matters to be mandatory subjects of collective bargaining will "promote the fundamental purposes of the Act by bringing a problem of vital concern to labor and

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[33] See also *Houston Chapter, Associated General Contractors*, 143 NLRB 409, 413, enfd. 349 F.2d 449 (C.A. 5), cert. denied 382 U.S. 1026.

management within the framework established by Congress as most conducive to industrial peace." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211.[34]

Our dissenting colleague also argues that bargaining about benefits for retired employees will upset the "firm package of benefits [negotiated] for a fixed period." Our decision, however, does not introduce any element of uncertainty into the bargaining process that does not already exist. All employee benefits are subject to change at periodic intervals, either at the expiration of, or at times fixed by, the contract itself. At such times the "firm package of benefits" previously agreed upon becomes flexible, and the alterations which result from such bargaining might require revision of the parties' expectations and future planning. The dissent overlooks the fact that the parties before us have bargained about retirement benefits for retired employees for nearly 20 years. Moreover, in this case, the Employer unilaterally changed the "firm package of benefits," to which our dissenting colleague does not object. The logic of the dissent thus suggests the tenuous proposition that the package of benefits is "firm" only as a limitation on the Union's right to bargain about benefits for retired employees, but not "firm" as a limitation on the Employer's right to make unilateral changes. The fact that many employers and unions, like the parties before us, have long bargained about changes in health and other benefit plans for retired employees negates the dissent's concern that this is not a suitable subject for bargaining.

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[34] This conclusion does not, of course, preclude Respondent from bargaining hard, without concession, for broad areas of control over retirement benefits. See *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 408-409. However, Respondent here has gone beyond hard bargaining; it has taken the position that the Union has no statutory right to bargain for retired employees and that it may unilaterally make decisions affecting the rights of retired employees.

The dissent also fails to take account of the practical manner in which many retirement benefits plans are created and administered. Typically, a retirement benefit plan is created by a collective-bargaining agreement which is written only in general terms to provide for the creation of a plan and a method of financing. The details of eligibility, benefits, and administration are normally incorporated in a subsequently drafted trust agreement, not in the collective-bargaining agreement itself. In fact, even trust agreements are often written in general terms to permit the trustees to adopt specific regulations concerning eligibility and other matters, subject to periodic changes which the trustees may make as circumstances dictate. See *Kosty v. Lewis,* 319 F.2d 744 (C.A.D.C.),[35] cert. denied 375 U.S. 964. See also *In re Feldman,* 165 F. Supp. 190 (S.D.N.Y.). Thus, plans of this type are not static arrangements which, once executed, never change. They may, depending on their terms, undergo continuing change.

The dissent further asks "if the union may require bargaining over increases, could the employer not insist on decreases?" This is a complex and many-sided question which does not admit of a single, definitive answer here, nor is it relevant to the precise issue before us. The answer will doubtless depend in part upon the circumstances of each case.

There is a variety of formulas for creating, financing, and administering pension and health plans, and the legal implications of each may differ. For example, health plans

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[35] *Id.* at 748-749.

We do not deny the authority of Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry.

are of two main types: (1) those in which the collective bargaining agreement specifies only the level of the employer's contribution, without specifying the benefits which will be provided from the contribution; and (2) those in which the collective-bargaining agreement specifies only the level of benefits which the employees will receive, without specifying the cost obligation which the employer will incur in providing those benefits. How the parties choose to create, amend, or restructure such plans —consistent with their legal responsibilities to employee beneficiaries—is plainly a matter which Congress has entrusted to their judgment to be exercised in the light of their experience and the needs of affected employees. Normally, of course, retirement rights which are "vested" cannot be divested, but it does not inexorably follow that as a corollary "vested" rights may not be improved. What kinds of rights are "vested" in retired employees, when and how they vest, and, indeed, what "vesting" means in the context of a particular case are all problems of considerable importance which have not been entirely resolved in the courts and which are not presented by this case. See *Kosty v. Lewis, supra.* See also Harbrecht, *Pension Funds and Economic Power,* 53-61, 163-190; Strong, *Employee Benefit Plans in Operation,* 220-225. Thus, there is no necessity in this proceeding to decide whether and, if so, under what hypothetical circumstances an employer might be free to bargain about a decrease in retirement benefits being received by retired employees. We hold only that the duty to bargain about health care benefits does not end abruptly on the day that an employee retires and that his employer is not free on that day to deal with him unilaterally.

Finally, it is asserted that bargaining about retirement benefits for retired employees will raise difficult

questions in the event of changes in employee representatives or changes in employers. But that problem is not new in any respect. Parties always bargain in the present in contemplation of continuity in their relations. A change in the employer's or the union's status may indeed require reexamination of their needs and resources at that time.

VII. The Trial Examiner concluded that Respondent's March 1966 actions did not constitute a modification of health benefits for the reason that Respondent gave retirees the choice between supplemental Medicare and the existing health plan. However, the possible methods of adjusting the existing plan to Medicare's coverage may be considerably more varied than this unilaterally formulated choice offered by Respondent. See Foust, *Effect of Medicare on Privately Bargained Plans*, 19 N.Y.U. Conf. on Labor 273-285; *Medicare and Negotiated Health Insurance for Workers*, 88 Monthly Labor Rev. No. 9, pages iii-iv (Sept. 1965). Had the Union studied the matter and expressed its views in negotiations, a different option may have resulted. Whether Respondent's offer resulted in a desirable increase in retirement benefits is immaterial to our conclusion that Respondent was not free to act unilaterally; Respondent's establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits. *C. & S. Industries, Inc.*, 158 NLRB 454, 457-458. Accordingly, we find that by unilaterally modifying its medical insurance plan for retired employees, Respondent violated Section 8(a)(5) and (1) of the Act.[36]

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[36] Section 8(d) of the Act, which defines the bargaining obligation of Section 8(a)(5), expressly provides that, with exceptions not relevant here, "no party to such contract shall terminate or modify such contract." That the Respondent's unilateral modification of this contract might also give rise to an

(Continued on following page)

The General Counsel does not contend, nor do we find, that Respondent was obligated to engage in mid-term bargaining with the Union over its proposal to negotiate amendments in the health insurance plan. While the parties are of course free to engage in mid-term bargaining voluntarily, we hold only, on the record of this case, that the Respondent violated the statute by making unilateral changes in the terms of an outstanding contract with respect to benefits for retired employees.

The Remedy.

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom, and from like or related conduct, and that it take certain affirmative action to effectuate the policies of the Act.

Conclusions of Law.

1. Pittsburgh Plate Glass Company, Chemical Division, is an Employer within the meaning of Section 2(2) of the Act, engaged in commerce and business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 1, Allied Chemical and Alkali Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instituting unilateral adjustments in the health insurance plan for its retired employees, Respondent violated Section 8(a)(5) and (1) of the Act.

(*Continued from preceding page*)

arbitration proceeding or an action for contract enforcement does not preclude the Board's exercise of its statutory obligation to remedy the unfair labor practice. *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421; *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pittsburgh Plate Glass Company, Chemical Division, Barberton, Ohio, its officers, agents, successors, and assigns, shall take the following action:

1. Cease and desist from:

(a) Refusing to bargain collectively with the above-named labor organization with respect to retirement benefits.

(b) Making unilateral adjustments in health insurance plans for retired employees, without first negotiating in good faith with the above-named Union concerning such adjustments.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board deems necessary and appropriate to effectuate the policies of the Act:

(a) Upon request of the above-named Union, rescind any adjustment in the health insurance plan for retired employees which Respondent unilaterally instituted.

(b) Mail a copy of the attached notice marked "Appendix" [37] to each retired employee and post copies in its

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[37] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

plant in Barberton, Ohio. Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by the Respondent's authorized representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D. C., July 9, 1969.

FRANK W. McCULLOCH,
Chairman,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,

HOWARD JENKINS, JR.,
Member,

NATIONAL LABOR RELATIONS BOARD.

(SEAL)

Member Zagoria, dissenting:

I am constrained to dissent from the decision of my colleagues and I would affirm the result reached by the Trial Examiner.

Stripped to its essentials, this is a case where a union charges an employer unilaterally offered an additional option on its health plan for past pensioners. The Company said it did so because the Federal Medicare program made its own program obsolete, but, after union protests,

assured the pensioners they could choose to retain the original program without change. On this narrow base, the Board majority has erected a decision with far-reaching implications in the area of mandatory duty to bargain.

I do not question in the slightest the well-established principle that retirement and profit-sharing plans and other forms of deferred compensation are mandatory subjects for collective bargaining when the proposed beneficiaries are employees currently on the payroll, and it is the wages and benefits to be paid for their labor which is the subject of the negotiations.

The question in the present case, however, is whether *retirees* are employees in this unit and whether there is a duty to bargain for these former workers placed upon the shoulders of the Company and a duty placed on the Union *to represent them fairly in* such negotiations. Under the Act a union's status as exclusive bargaining agent is with respect to all employees in the appropriate unit. The fact that retirees are no longer working for the employer, are not on the payroll, probably have no access to the plant, or hope of recall to employment does suggest that their status is accurately described as pensioners, not as employees. Apart from the question whether retirees are "employees" as defined by the Act, it is clear to me that retirees are not within the bargaining unit. The Board itself recognizes this for it does not, for example, permit retirees to vote in a certification election; nor would the Board, I am confident, permit a group of retirees to initiate a decertification election. Indeed, in this case, and the *amicus* briefs indicate this may not be atypical, retirees are limited only to honorary nonvoting membership status by the union. This being so, the Act gives the union no authority or duty to represent them and imposes no obligation on the employer to bargain about them with the union.

I am not persuaded by the majority's analogies to other areas of Board law, and their contention that the terms "employee" and "unit" are flexible enough to encompass the present situation. One area mentioned concerns the Board's election eligibility rules, under which, it is pointed out, some individuals are not permitted to vote, even though by the time of the election they are employees in the unit. However, this rule merely provides an administrative cutoff date for convenience in conducting elections, and to prevent payroll padding and other possible abuses. It does not in my view have relevance in an area where such considerations are not present.

The majority's reference to the *Wasson* line of cases is likewise not pertinent. The Board did, at one time, as in *Wasson*, make a distinction between unit inclusion and eligibility to vote. It no longer does so[38] for reasons precisely in point here: if an employee has sufficient interests to be included in the unit, he should be given a voice in the selection of a bargaining representative; if he is not given such voice, he should not be included in the unit.

Lastly, the cases involving discrimination are readily distinguishable. Though an employer may violate Section 8(a)(3) by refusing to hire particular employees, he does not normally violate Section 8(a)(5) by refusing to bargain about them, where they have not yet been made his employees.[39] As the Board has stated in a related context:

> We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited * * * which hold that the antidiscrimination provisions of Section 8(a)(3), (4), and (b)(2) of the Act forbid discrimination against applicants for

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[38] *Denver-Colorado Springs-Pueblo Motor Way*, 129 NLRB 1184.

[39] *Piasecki Aircraft Corp.*, 123 NLRB 348, 349-350, enfd. 280 F.2d 575 (C.A. 3), cert. denied 364 U.S. 933.

> employment. The antidiscrimination provisions refer to "employee" *generally,* whereas, unlike those provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for "*his* employees." [40]

The employees involved in the present case may have had no employment with the employer for 5, 10, or even 15 years. Unlike employees on sick leave or military leave, they have no prospect or intention of returning. In most respects retirees are in no different status than individuals who have left the bargaining unit for other reasons. In holding them to be within the unit for which the Union has a right to bargain, the Board is going beyond anything it has said or done in other types of cases.

Further, the majority position poses some difficult questions. For example, where the union currently representing employees in a bargaining unit is not the same one chosen by the retirees when they were actively employed, which union is the appropriate representative of the retirees? In some situations, the retirees may have earned their pension during a period in which the majority of employees rejected collective-bargaining representation. Is the present bargaining agent obligated to represent these retirees? If it does represent them, what is the extent of its duty of fair representation? Do the retirees have access to the Board or courts, if they feel they have been unfairly represented? May the bargaining agent require pensioners to comply with union-security requirements adopted by the active membership?

Now as to the bargaining itself, the statute requires bargaining "in good faith with respect to wages, hours, and other terms and conditions of employment," but retirees are no longer engaged in employment and the bargaining under discussion here relates to terms and con-

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[40] *Page Aircraft Maintenance, Inc.,* 123 NLRB 159, 163, fn. 5.

ditions of employment long since completed. An oft-cited advantage of collective bargaining is that it results in a specific agreement satisfactory to both sides setting out a firm package of benefits for a fixed period. The company can base its prices and general business policy on this and workers can insist on exact payment of the agreed-upon benefits. If mandatory bargaining is required, either party years later can reopen the agreement and unravel the provisions. Moreover, bargaining is a two-way street, and not only upward. Thus, if the union may require bargaining over increases, could the employer not insist on decreases?

As the majority view suggests collective bargaining is a dynamic institution. Indeed the examples cited of successful bargaining for increases in benefits for retired workers demonstrates that foresighted employers and unions, recognizing the mutuality of interest in retired workers, have used the institution of voluntary collective bargaining imaginatively. They have made adjustments although the affected group could no longer pose the threat of withholding its labor to implement its demands. They have found the subject suitable, even if not mandatory.

We are all understandably concerned that benefits promised to retirees be paid. In addition to individual court actions by aggrieved pensioners, many unions have voluntarily, and at considerable cost to themselves, undertaken to represent retirees in claims against employers and, similarly, many employers have voluntarily, also at considerable cost to themselves, undertaken to improve benefits to retirees, recognizing the impact of inflation on those receiving fixed benefits. Many unions and companies, recognizing their mutual interest in retiree benefits, have voluntarily worked out arrangements to improve past pensioners' rights and benefits. These voluntary

agreements, these voluntary representations, are a tribute to the humanistic quality of an enlightened labor-management relationship, but to hold that these matters are the subject of mandatory bargaining, while perhaps socially desirable, is, in my judgment, beyond the intent of the statute. I would therefore, like the Trial Examiner, dismiss the complaint.

Dated, Washington, D. C., July 9, 1969.

SAM ZAGORIA,
Member,
NATIONAL LABOR RELATIONS BOARD.

APPENDIX.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A Decision and Order of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify our employees that:

WE WILL NOT refuse to bargain with LOCAL UNION NO. 1, ALLIED CHEMICAL AND ALKALI WORKERS OF AMERICA, with respect to retirement benefits.

WE WILL NOT unilaterally institute adjustments in health insurance plans for retired employees, without first negotiating in good faith with the above-named Union concerning such adjustments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request of the above-named Union, rescind any adjustments made in the health insurance plan for retired employees which we unilaterally instituted.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION.

(Employer)

Dated ________ By ______________________ ________
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1695 Federal Office Building, 1240 E. 9th Street, Cleveland, Ohio 44199, Telephone 216-522-3715.

APPENDIX E.

DECISION OF TRIAL EXAMINER.

TXD-196-67
Barberton, Ohio

Case No. 8-CA-4202.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION,
and
LOCAL UNION NO. 1, ALLIED CHEMICAL AND
ALKALI WORKERS OF AMERICA.

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

JAMES V. CONSTANTINE, Trial Examiner: This case is before a Trial Examiner of the National Labor Relations Board upon a complaint issued on November 22, 1966, by the General Counsel of the Board (through the Regional Director for the Eighth Region, at Cleveland, Ohio) pursuant to Section 10(b) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 160(b). That complaint is based on a charge filed on April 12, and amended on November 22, 1966, by Local Union No. 1, Allied Chemical and Alkali Workers of America, against Pittsburgh Plate Glass Company, Chemical Division, Respondent herein. Essentially, the complaint alleges that Respondent has infringed Section 8(a)(1) and (5) of the Act, and that such conduct affects commerce within the meaning of Section 2(6) and (7) thereof. Respondent has answered, admitting some facts but denying that it perpetrated any unfair labor practices.

Pursuant to due notice this cause came on to be heard before me at Mansfield, Ohio, on January 17, 1967. All parties were represented at and participated in the hearing and were granted full opportunity to introduce evidence, examine and cross-examine witnesses, submit briefs, and offer oral argument. Respondent's motions to dismiss at the close of the hearing were denied. Briefs of superior excellence have been received from all parties.

This case presents the question of whether an employer has failed to bargain collectively with the majority representative of his employees (a) by unilaterally changing the pension benefits of retired employees provided for in a collective-bargaining contract, and (b) whether the employer's conduct constitutes a unilateral change.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT.

I. Jurisdiction.

Respondent, a Pennsylvania corporation, is engaged in manufacturing and selling glass and glass products. From its Barberton, Ohio, plant, which is the only facility involved in this proceeding, Respondent annually ships goods valued in excess of $50,000 to points located outside the State of Ohio. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. The Labor Organization Involved.

Local Union No. 1, Allied Chemical and Alkali Workers of America, herein called Local No. 1 or the Union, is a labor organization within the contemplation of Section 2(5) of the Act.

III. The Unfair Labor Practices.

Virtually no dispute exists as to the facts, so that fundamentally an issue of law has been unfolded by the record.

Since January 1949, the Union has been the exclusive representative for the purposes of collective bargaining of the employees of Respondent in a unit composed of:

> All hourly rated employees at the Respondent's Barberton, Ohio, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

I find that said unit is appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Since 1949, Respondent and the Union have negotiated several collective-bargaining contracts, as more fully described below.

In the summer of 1950 the parties negotiated a collective-bargaining contract which, among other things, provided for medical insurance for employees and, for the first time, contained a pension plan. During negotiations the parties agreed orally, but did not incorporate into the contract or otherwise reduce to writing, that retired employees could participate in the above-mentioned medical insurance benefits by paying a stipulated premium. No company contribution was made towards that premium. Such premium was deducted from pension payments. This arrangement as to those on retirement continued without alteration until 1954, when it was unilaterally changed by Respondent. Then the new benefits for retirees remained unchanged until 1960.

In the fall of 1959, during discussions relating to extending their collective-bargaining agreement, the parties bargained for and agreed to modify their pension agree-

ment and the medical insurance benefits of retirees on pension. This change, which went into effect in 1960, granted retired pensioners an increase in the maximum daily amount of hospitalization benefits. Unlike its predecessor, this agreement concerning medical insurance benefits for retirees was incorporated in a written document. See Company Exhibit 1. During the above discussions the Company challenged the Union's right to negotiate pensions and medical insurance programs for employees who had already retired.

Again, in 1962, the parties, while negotiating a new collective-bargaining contract, bargained for and agreed upon certain modifications of Respondent's pension plan, but left intact the medical insurance benefits of pensioners. See General Counsel Exhibit 4 for the Pension Plan. However, Respondent in a separate, contemporaneous understanding, which was embodied in a written instrument, for the first time became obligated to contribute towards the medical insurance premium of any employee who retired on or after June 28, 1962, and who elected to subscribe to such an insurance plan. Such contribution was $2 a month. See General Counsel Exhibit 2 and Respondent Exhibit 5. At the same time the parties also executed a collective-bargaining agreement in still another and distinct document. See General Counsel Exhibit 3.

During negotiations in 1964 for a new collective-bargaining agreement, the parties modified the medical insurance provisions for those already on pension whereby Respondent increased by $2 its contributions toward the cost of premiums for medical insurance for such pensioner, thus contributing $4 a month toward the premium. It was further agreed that this $2 increase would be eliminated by Respondent in the event that "Medicare or a program of Government type insurance" was instituted.

See General Counsel Exhibit 5. This modification was in the form of a separate supplement or addendum to a bulky document synchronously adopted as a collective-bargaining contract. See General Counsel Exhibit 6 for the latter contract.

About November 23, 1965, the parties met to discuss certain pending grievances. When their talks upon other subjects were concluded, the Union requested Respondent to negotiate a program of insurance which would provide retirees, whether covered by Medicare or not, with benefits not provided by Medicare. At this time Medicare had been passed by Congress to go into effect in 1966. Respondent's labor relations director, John Rodgers, replied that the Company would take this matter under advisement and give the Union an answer "at an appropriate time." Shortly before March 21, 1966, the Union reminded the Company's labor relations supervisor, David Redle, that it had not received a reply to its said request of the previous November; but although Redle professed ignorance thereof, he promised to refer it "to the proper people." He did. Thereafter the Company's officials thoroughly considered it. About March 10, Rodgers called Williams to express the belief that Respondent "would have something" in a week or 10 days.

Then on March 21, 1966, Industrial Relations Director Rodgers asked Vice President Williams of Local No. 1 to meet with Rodgers and Plant Manager Harris at about 3 p.m. They did meet at the appointed time. A committee from the Union accompanied Williams thereat. Asserting that the Company had an answer to the Union's question of the previous November, Rodgers insisted that by virtue of the agreement reached in 1964, Respondent was entitled to "reclaim" $2 of its $4 contribution if a Medicare program was adopted. Continuing, Rodgers observed that Medicare had been enacted and that, beginning July 1,

1966, the Company would "reclaim" $2 a month from each retiree receiving the $4 a month contribution. Further, Rodgers said that Respondent intended to "cancel out" its insurance program for all retirees because Medicare had rendered this feature of retirement benefits practically useless, but added that $3 a month would be paid to such pensioners towards the cost of subscribing to Medicare. This meant an additional $1 a month to those receiving a $2 a month contribution after July 1, 1966, when $2 of the above $4 would be "reclaimed." Rodgers then commented that the present insurance program for pensioners, among other things, prevented payment of insurance benefits if another group plan paid similar group benefits, and he considered that Medicare qualified as such other group plan.

Union Vice President Williams took issue with Rodgers on this. Although Williams conceded to Rodgers that as a matter of contract the Company was empowered to cease making the extra $2 contribution, Williams insisted that Respondent was not entitled to cancel the insurance of pensioners since it was guaranteed by the agreement of 1964. In addition, Williams contended that the Company was powerless to make such a unilateral change without bargaining with the Union on it because it was a bargainable subject. Finally, Williams posed the question of what Respondent would do for retirees under 65 who were ineligible for Medicare and for all other pensioners, regardless of age, who were not qualified to apply for Medicare. Rodgers replied that Respondent would have to work out a program for such retirees as well as for their wives. Also, Rodgers mentioned that insurance for retirees was optional with them, that the Union had no right to bargain for employees who had retired, and that the Company's bargaining with another union for changes in benefits of persons already retired,

to which Williams adverted, involved "a different division under a different management." Williams did not question the assertion of Rodgers that insurance was optional with retirees.

On March 23, 1966, Plant Manager Harris telephoned to Union Vice President Williams that, upon reconsideration, the Company had rescinded its decision to cancel the insurance benefits of pensioners and, instead, would offer each group of retirees by mail an option to cancel or retain their insurance and, to those who chose to cancel, would contribute $3 a month to be used toward the cost of premiums for those electing to be covered by Medicare. (Such letters were sent later, and copies thereof were furnished to Local No. 1. See General Counsel Exhibit No. 7.) Williams reiterated his position of March 21, 1966, and again demanded that this was a bargainable matter.

On October 11 and 20, 1966, in discussing a new collective-bargaining agreement, the Company twice orally proposed to pay a $3 contribution for those retirees electing to cancel their insurance, in effect reiterating its position taken on March 23, 1966. This was unacceptable to the Union. This proposition was also submitted in writing on October 11, 1966. See General Counsel Exhibit 8, p. 4. The Union rejected it.

No further oral or written communications concerning medical insurance benefits have passed between the parties.

Concluding Findings and Discussion.

In his brief, the General Counsel has vigorously and ably contended that Section 8(a)(5), amplified by Section 8(d), imposes upon an employer a duty to meet and confer with a union with respect to wages, hours, and other terms and conditions of employment, and that this

obligation "prohibits unilateral changes in conditions of employment which are mandatory subjects of bargaining or unilateral changes which modify contractual terms or conditions of employment." Of course this accurately portrays the present state of the law. *George E. Light Boat Storage, Inc.*, 153 NLRB 1209, enforced, 64 LRRM 2457 (C.A. 5). It is binding upon me, and I shall follow it to the extent that the facts found herein render it pertinent. Hence, the initial question is to determine whether the record discloses that Respondent has failed to meet and confer with Local No. 1 upon wages, hours, and other terms and conditions of employment regarding employees in the unit heretofore found to be appropriate.

In this connection, I find that pensions and health insurance are mandatory subjects of bargaining with respect to employees in the unit above described. *Phelps Dodge Copper Corp.*, 101 NLRB 360, 379, and cases there cited; *Inland Steel Co.*, 77 NLRB 1, 170 F.2d 247 (C.A. 7). And I further find that Respondent did not confer with the Union regarding the proposed changes in the health insurance benefits of retirees as set forth in General Counsel Exhibit 7. While it is true that Respondent had mentioned to the Union that it intended to make such offers to the retirees, it is equally patent that Respondent refused to discuss such proposals with the Union and expressly disagreed with the Union when the latter maintained these were bargainable matters. Hence, I find that Respondent's statements to the Union relative to such announced modifications do not rise to the stature of negotiations embraced by the statutory definition of "to bargain collectively" in Section 8(d) of the Act.

The record is barren of any evidence that Respondent altered, changed, or modified unilaterally any pension benefit to be received in the future by employees now in the appropriate unit. Accordingly, the allegations of the

complaint alleging such unilateral action have not been sustained, and I shall recommend dismissal of the complaint as to these allegations.

One other matter may be disposed of at this stage of the Decision, i.e., the reduction of Respondent's contribution to the insurance premiums from \$4 to \$2 a month. Since the contract vested this privilege in Respondent—a contention which the Union did not dispute—no refusal to bargain may be based upon Respondent's unilateral reduction of its contribution from \$4 to \$2 a month. Accordingly, upon this segment of the case no violation of Section 8(a)(5) has been established.

Since I have found that Respondent has refused to meet and confer with the Union regarding changes unilaterally to be made by Respondent, the question is whether such refusal (except as to the lawful decrease of \$2 a month described above) constitutes an infringement of Section 8(a)(5) of the Act which enjoins an employer to "bargain collectively with the representatives of his employees." This in turn depends on whether retired persons no longer employed in the unit enjoy the status of employees within the contemplation of Section 8(a)(5) of the Act.

It is my opinion, and I find, that pensioners and retirees are not employees as defined by Section 2(3) of the Act (*Public Service Corporation,* 72 NLRB 224, 230), and, therefore, are not employees within the meaning of Section 8(a)(5). Hence, they are not employees in the unit which Respondent represents. Therefore their pensions and other benefits received as retirees and pensioners are not the mandatory subjects of collective bargaining, and Respondent is not under a statutory onus to bargain thereon. While no express Board or court adjudications so hold, certain determinative factors point to this conclusion.

1. In the first place, pensioners patently are not employed in the unit. Not only are they not now employed by Respondent, but they have no reasonable expectation of being re-employed under the terms of Respondent's pension plan agreement with the Union. Of course I recognize that persons may remain in a unit as employees while not actually employed therein; but in such instances, i.e., when on sick leave, other leave, or layoff status, the conditions of nonemployment contemplate not only a continuation of the employer-employee relationship but also a resumption of or return to work in the predictable future.

And I further acknowledge that in some instances a person not employed in a unit may be treated as an employee for some purposes of the Act. Thus, an applicant for employment (*Phelps Dodge v. N.L.R.B.,* 313 U.S. 177), or a registrant at a hiring hall (*Houston Chapter, A.G.C.,* 143 NLRB 409, 412-413), or an independent contractor (*N.L.R.B. v. Hearst Publications,* 322 U.S. 111), or a striker (Section 2(3) of the Act), or persons losing jobs upon a change in ownership. (*Chemrock Corporation,* 151 NLRB 1074), all have been held to be employees under the Act. But in all these situations a fundamental ingredient—absent in the instant case—has been the reasonable prospect that an employer-employee status was capable of being developed. And cases like *Briggs Mfg. Corp.,* 75 NLRB 569, cited by the Union, are distinguishable, because there the person involved—unlike the pensioners here—was a member of the working class.

However, I am unable to accept Respondent's argument that pensioners may not be treated as employees because they lose their membership in the Union when they retire. This conclusion follows as a corollary of the rule that a labor organization may act as a collective-

bargaining representative of employees in a unit regardless of whether it admits such employees to its membership. *F. C. Russell Company,* 115 NLRB 1015 n. 5. Therefore, union membership is not a compelling factor on the issue here. Nevertheless, to reject this contention does not alter the result reached herein.

2. Secondly, in comparable situations the Board has considered persons not employed in a unit as not embraced by that unit, even though they formerly may have been part of it. Thus, when employees in a unit are promoted to supervisors they thereby are excluded from the unit and, so long as they retain their supervisory capacity, the bargaining representative of the unit may not as a matter of right require bargaining with respect to them. *Retail Clerks International Association, et al.*, 96 NLRB 581; *N.L.R.B. v. Retail Clerks,* 186 F.2d 371, 31 LRRM 2606, 2609, 203 F.2d 165 (C.A. 9).

Further, the Board has specifically held that retired persons formerly employed in a unit are ineligible to vote in an election to determine whether a collective-bargaining agent shall represent the employees currently working in that unit. *Taunton Supply Corp.*, 137 NLRB 221, 223; *W. D. Byron & Sons,* 53 NLRB 172, 175. If retired persons are excluded from a unit for the purpose of voting for a representative of that unit, manifestly they also should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit.

Upon this aspect of the proceeding, the following situation is not difficult to visualize. Suppose that union A represents the employees in unit X in the plant of an employer, and that union B represents the employees in unit Y of the same employer in the same plant. If employee C transfers from unit X to unit Y, patently union A no longer represents employee C and may not bargain for

him because he no longer is employed in unit A. Citation of authority would be supererogatory. Nor may an employer demand that a Union bargain as to units whose employees work for another employer. See *United Mine Workers v. Pennington,* 381 U.S. 657, 666-667. Cf. *Local 24 v. Oliver,* 358 U.S. 283.

A final example suffices. It is not unusual for one union, A, to be displaced as the bargaining representative of a unit by another union, B, or no union. In such instances, while it is true that rights under the contract between union A and the employer may survive even after union A has been replaced by union B or no union (See *John Wiley & Sons, Inc., v. Livingston,* 376 U.S. 543), it is equally true that union A may not insist upon bargaining for employees in the unit. Cf. *L. B. Spear and Company,* 106 NLRB 687, 689; *Retail Clerks v. Lion Dry Goods, Inc.,* 369 U.S. 17. See *Southern Conference of Teamsters v. Red Ball Motor Freight, Inc.,* 64 LRRM 2545, 2549 (C.A. 5). If material, I find that Local No. 1 herein is not remediless, for I find that, since rights survive under the contract, suit may be brought, either for damages, specific performance, or both, to remedy any breach thereof. Cf. *Modine Mfg. Co. v. I.A.M.,* 217 F.2d 326 (C.A. 6); *McGuire v. Humble Oil Co.,* 355 F.2d 352 (C.A. 2).

3. I find that the pensioners' benefits under the contract are vested and survive the expiration of the contract. *N.L.R.B. v. Frontier Homes Corp.,* decided 2/6/67 (C.A. 8); *United Steelworkers of America v. Porter,* 64 LRRM 2201 (D.C.W.D. Pa.). In my opinion *N.L.R.B. v. Cone Mills Corporation,* 64 LRRM 2436 (C.A. 4), is distinguishable, for the nature of the rights there involved dissolved with the termination of the contract. Additionally, I find that the Union in the instant case at most has demonstrated that Respondent has failed to abide by its obliga-

tions under the contract. Of course, a breach of contract does not preclude a finding that Respondent thereby also committed an unfair labor practice. *Smith v. Evening News Assn.*, 371 U.S. 195; *C. & C. Plywood v. N.L.R.B.*, ____ U.S. ____, 64 LRRM 2065; *N.L.R.B. v. George E. Light Boat Storage, Inc.*, 64 LRRM 2457 (C.A. 5). Nevertheless, a breach of contract is not *per se* an unfair labor practice; and, since the record discloses a breach without more, as found above, I conclude that Respondent's purported unilateral modification of the medical benefits of retirees merely subjects Respondent to an action or suit based upon the contract provisions.

In this area of the case I do not pass upon the question of whether an employer and a union may, by contract, reduce the vested benefits of retirees. Cf. *Upholsterers' Union v. American Pad Co.*, 64 LRRM 2200 (C.A. 6). It would seem, however, that fixed rights may not be adversely affected by the parties to a collective-bargaining contract. Thus, I doubt that an employee can be compelled to disgorge some of his wages already received because of subsequent negotiations between the Union and the employer, or that employer contributions actually made to a savings plan may later be withdrawn by agreement between the employer and the Union. In *Oliver Corporation*, 162 NLRB No. 68, the matters sought to be bargained about were not vested and also related to present working conditions; hence, it was not fatal that some of these matters pertained to employees who had already been terminated.

Certain arguments of the General Counsel and the Union deserve comment at this point.

First, they contend that these benefits are part of the overall collective-bargaining contract negotiations and, therefore, affect employees admittedly in the unit. But

this means no more than that pensions for employees in a unit are subjects of mandatory collective bargaining, a fact which I have already found and which is not seriously disputed by Respondent. But the question is not whether pensions may be negotiated for employees in the unit; rather, it is whether the Union may bargain for retirees who are no longer employed in the unit. Further, the Union herein may not insist upon bargaining for employees in another unit, such as office clericals, even though (a) some or all of those clericals are transferees from the Union's hourly rated unit, and (b) the wages and other benefits received by the office clericals manifestly affect employees in the hourly rated unit. Hence, I conclude that this argument is not well taken.

Then again, the argument is pressed that pension benefits are deferred earnings or benefits, and, therefore, they constitute mandatory subjects of collective bargaining. It is axiomatic that pensions for employees admittedly in the unit are subjects of mandatory collective bargaining, and I have already so found. *Inland Steel Co.*, 77 NLRB 1, enforced, 170 F.2d 247 (C.A. 7); *Phelps Dodge Copper Corp.*, 101 NLRB 360, 379. It may also be conceded that pension plans may be classified as deferred earnings or benefits and, as such, are mandatory subjects of collective bargaining when comprehending those employees actually employed in a unit. But this decides nothing, for the question in this case is whether such deferred earnings may be the compulsory subject of further negotiations after those entitled to the same are no longer in the unit and are ineligible to return to the unit. This question must be resolved by ascertaining the status of those receiving the pensions; and, since they do not qualify as employees under Section 2(3) of the Act, Sections 8(a)(5) and 9(a) do not become operative as to

them. Accordingly, I find that this contention may not be sustained.

General Counsel also cites, as tending to uphold his position, cases interpreting the word "employees" in Title III of our Act. Apart from the fact that the word "employees" in Title III may sometimes connote different classes from "employees" in Title I (*United States v. Ryan*, 350 U.S. 299, 306-307), these cases to which the General Counsel alludes in my opinion do not stand for the proposition that pension benefits actually received by retirees are subjects of compulsory collective bargaining. He refers to *Local 688 v. Townsend*, 345 F.2d 77 (C.A. 8); *Blassie v. Kroger Company*, 345 F.2d 58 (C.A. 8); and *Garvinson v. Jensen*, 355 F.2d 487 (C.A. 9). They merely hold that collective-bargaining contracts may lawfully provide that employees who have retired shall enjoy the benefits described in Section 302(c)(5) of the Act, and that such contracts may provide that such individuals shall receive such benefits after they retire and need not restrict benefits to employees working at the time.

But I have already found that the pension benefits to be received by an employee when he retires are subjects of mandatory collective bargaining and that an employer may be held accountable for failure to comply with a contract which contains such provisions. On the other hand, it is desirable again to stress that the issue in the instant case is not whether retirees may be beneficiaries of benefits pursuant to a collective-bargaining contract or whether suit may be instituted if contract clauses providing those benefits are not honored, but instead, the question is whether such benefits are subjects of further mandatory collective bargaining as to those persons who no longer are employed in the unit represented by the Union.

Finally, the General Counsel maintains that medical

benefits enjoyed by retirees are subjects of permissive or voluntary collective bargaining within the purview of *N.L.R.B. v. Borg Warner Corp.*, 356 U.S. 342, and that, since the parties have voluntarily negotiated an agreement thereon, such agreement may not be unilaterally modified during the term of the contract except by complying with Section 8(d) of the Act. Upon this aspect of the case I find that the foregoing benefits are subjects of permissive or voluntary bargaining (see *Mill Floor Covering, Inc.*, 136 NLRB 769), and that the parties have a contract or agreement covering them. Additionally, I find that the Board would require the parties to incorporate into a written document the terms of their understanding concerning this permissive subject of collective bargaining. *Associated Building Contractors of Evansville, Inc.*, 143 NLRB 678, 680. It follows, and I further find, that Section 8(d) proscribes mid-term modification of said agreement by unilateral action of either party.

But I am unable to find that Respondent has modified or changed this agreement. Although I find that Respondent wrote to retirees the letters set forth in General Counsel Exhibit 7, I find that such letters do not modify the agreement between Respondent and the Union. Initially, I find that they were not sent to present employees working in the unit. In addition, although the first letter in said series mentions that Respondent will make a $3 a month contribution towards Medicare, it is offered only to pensioners who are not enrolled in any medical plan provided by the collective-bargaining agreement. Hence, no change in the terms of that agreement is discernible in the language of this first letter.

The second, third, fourth, and fifth letters in said series offer retirees an election to accept Medicare or to continue in effect the current medical benefits conferred

upon them by the contract between Respondent and the Union. I do not construe these last four letters as modifying said agreement, since employees were free to decline such offer, so that I find that they do not constitute a mid-term change of the contract contemplated by Section 8(d) of the Act. This situation is somewhat analogous [to] that in which an employer offers an employee in one department, represented by a labor organization, an opportunity to transfer to another department, not represented by a union, where wages are different. In this latter event it would seem that, since the employee is given a choice to retain his present position, the offer of another job at other wages does not amount to a mid-term unilateral change of the collective-bargaining contract.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law.

1. Local No. 1 is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Pensions and other benefits to be received by employees in an appropriate unit after they retire are subjects of mandatory collective bargaining between the employer and the exclusive collective-bargaining agent selected by a majority of such unit.

4. Persons actually retired and receiving pensions and who have no reasonable expectation of being re-employed in the appropriate unit from which they retired are not employees within the meaning of Section 2(3) of the Act.

5. Pensions and other benefits received by persons after they retire from the appropriate unit in the manner set forth above are not subjects of mandatory bargaining, but are subjects of permissive or voluntary collective bargaining.

6. The pensions and other benefits of persons actually retired and involved in this proceeding are vested rights and survive the expiration of any one or more contracts creating such benefits.

7. Respondent has not committed any unfair labor practices as alleged in the complaint.

RECOMMENDED ORDER.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that the Board dismiss the complaint herein in its entirety.

Dated at Washington, D. C.

JAMES V. CONSTANTINE,
Trial Examiner.

APPENDIX F.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or elect such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing:

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract

shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and

conditions can be reopened under the provisions of the contract.

* * * * *

REPRESENTATIVES AND ELECTIONS.

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

Relevant provisions of Title III of the Labor Management Relations Act, 29 U.S.C. Sec. 186, are as follows:

Section 302 (c) The provisions of this section shall not be applicable:

* * * * *

(5) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal, income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a writ-

ten agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.